Decision of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 372—October Term, 1962

(Argued June 4, 1963 Decided June 17, 1963)

Docket No. 28017

GEORGE HOLLANDER,

Plaintiff-Appellee,

v.

ALEX HOLLANDER,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

CLARK, *Circuit Judge,* and BARTELS, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Dudley B. Bonsal, Judge.

Alex Hollander appeals from an order adjudging him in contempt of court. Affirmed.

COPAL MINTZ, New York City, *for defendant-appellant.*

MORRIS POTTISH, New York City, *for plaintiff-appellee.*

PER CURIAM:

In an action before Judge Dimock, defendant-appellant was found to have engaged in stock transactions for the

joint account of himself and his brother, plaintiff-appellee. Judge Dimock ordered an accounting. When it was submitted, plaintiff thought it inadequate and sought to have defendant held in contempt. Judge Dawson agreed that the accounting was inadequate, but felt that defendant should be given a second chance to comply. When the second accounting was presented, plaintiff again moved to have defendant adjudged in contempt. Judge Bonsal found that defendant still had not complied with Judge Dimocks' order and appointed Frank H. Gordon, Special Master, to conduct a hearing so as to obtain the accounting which defendant persisted in failing to make. The result of these proceedings was a recommendation that defendant be held in contempt. Judge Bonsal accepted the Special Master's recommendations, directed the defendant to pay $1,379 to plaintiff's attorney as reasonable compensation and disbursements, together with $3,000 to the Master as fee, and further directed a proper accounting or penalty of a $3,000 fine. Defendant now appeals from this judgment.

Plaintiff asks us to reopen the denial of his motion to dismiss the appeal, made by another panel of this court. This, however, we are unwilling to do. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U. S. 541, 545-547. The defendant must pay over large sums of money to plaintiff's attorney and the Special Master, and this order he cannot effectively appeal after the final judgment on the accountings. The issue on the merits is whether the defendant made a bona fide effort to comply with the district court's mandates. In such a situation, demeanor has crucial importance. Beyond that, defendant's conduct seems dubious and irresponsible. Thus there is no basis for setting aside the determinations of two district judges and the Special Master.

Affirmed.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

PETITION FOR REHEARING

Copal Mintz, New York, N. Y.
for Defendant-Appellant

Petition denied.

J. L. L.,
C. E. C.,
U. S. C. J.J.

J. R. B.,
U. S. D. J.

2 July, 1963.

Petition to Court of Appeals for Rehearing.

[SAME TITLE]

Defendant-appellant respectfully petitions the Court for a rehearing of the appeal herein decided June 17, 1963.

This petition proceeds from the belief that in affirming the orders appealed from the Court did not give sufficient consideration to the point—Point II (pp. 22-24) of appellant's main brief and Point I (pp. 1-3) of appellant's reply brief—that Judge Bonsal's direction, in advance of the reference ordered by him, that the costs of such reference shall be borne by appellant was a prejudicial prejudgment which infected the determination and report of the Special Master and thus the order appealed from.

In arriving at its affirmance, this Court said *per curiam:*

> "The issue on the merits is whether the defendant made a bona fide effort to comply with the district court's mandates. In such a situation, demeanor has crucial importance. . . . . Thus there is no basis for setting aside the determinations of two district judges and the Special Master."

The determination of Judge Dawson was on papers only. So was the last order of Judge Bonsal. Neither of them, therefore, *was better advantaged* than this Court to determine the issues (*Senato v. United States*, 173 F. 2d 493, 2d Circ. 1949; and cases cited therein).

Only the Special Master had the benefit of "demeanor". Thus it was the hearing before the Special Master which was of "crucial importance". Therefore, it was crucially important that the proceedings before him be free of any subconscious prejudicial influence.

It was in that crucial aspect that, appellant urges, the proceedings which resulted in the appealed from order were *improperly weighted against appellant* by the ad-

vance mandate that the costs of the hearing be borne by the defendant. There was such prejudicial weighting because the Special Master thereby was placed in the position of where his finding in favor of the appellant would have rendered that direction unsupportable. The same embarrassment also inhered in the subsequent consideration by Judge Bonsal of the Special Master's report.

The undersigned respectfully re-stresses that such improper influence of judgment (all the more so if subtle and subconscious)—that such impediment to impartial determination—is contrary to the interest of justice and is a denial of due process.

This Court's view that in a case such as this "demeanor has crucial importance", it is submitted, emphasizes the pivotal importance of the hearing and, hence, the crucial importance of any factor operative against unimpaired objectivity of evaluation and reporting.

The usual reluctance to upset a finding of fact should not obtain where the proceedings are not free of legal error and such error cannot confidently be held to have had no effect on the determination. It is respectfully urged that the costs directive here complained of constituted legal error which infected the result—or, at least, cannot confidently be said not to have infected the result—and that thus, as a matter of law, the appealed-from order should be reversed.

I hereby certify that this petition is submitted sincerely and in good faith and not for purposes of delay or any other ulterior end.

Respectfully submitted,

COPAL MINTZ,
Attorney for Defendant-Appellant.

June 25, 1963.

Portion of Petitioner's Brief (in Chief) to Court of Appeals.

II.

The direction in Judge Bonsal's order of reference that the costs of the reference shall be borne by appellant was a prejudicial pre-judgment.

If Judge Bonsal was convinced by the evidence before him that appellant had contumaciously disobeyed or failed to comply with the judgment and order of Judge Dawson, there was no purpose or reason for directing a hearing by a Special Master.

If a hearing was requisite, there was no basis for determining in advance that the defending party rather than the moving party should bear the cost of the reference. It is only a losing party who is required to pay costs. To impose upon a defendant an obligation to pay the cost of a hearing to determine his guilt is, we submit, a glaring denial of due process.

Had the Special Master reported that, on the basis of the evidence developed before him, he could not recommend an adjudication of contempt, the advance direction that the costs of the hearing be borne by the defendant would have appeared to have been unsupportable. It cannot be assumed that the Special Master's objectivity was not subconsciously impaired by the realization that a report of acquittal would be quite embarrassing to the judge who had appointed him because of the advance direction that the costs of the hearing be borne by the appellant.

The same embarrassment confronted Judge Bonsal on the appellant's motion to reject the Special Master's report and deny the contempt application. It would be incongruous to acquit the appellant and yet impose upon

him the costs of the hearing. An acquittal thus would have had to be accompanied by the elimination from the order of April 30th of the provision that the appellant bear the costs of the hearing and to impose them upon the plaintiff *ex post facto*. Such impediments to impartial determination on the basis of the evidence adduced at the hearing are contrary to the interests of justice.

The prejudicial character of such an advance imposition of costs is illustrated by the fact that, in his brief to Judge Bonsal after the Special Master's report, appellant's counsel was under the necessity of saying, in order to set forth his position:

> ". . . in advance of the ascertainment of whether or not defendant had been contumacious and thereby had damaged the plaintiff, the court should not have ordered that the costs of the reference be borne by the accused party. It is rather strange that a party should be accorded an opportunity to defend himself only upon condition that he pay the costs and expenses of the prosecution. With all due deference, we suggest that the court was without power to make a direction of that character and that, in any event, it was improvident. To the extent that the direction was based upon a pre-judgment of guilt, it was precipitous, and if now upon the full record of the hearing, the court comes to the conclusion that the accounts which the defendant filed were not contumacious, it is submitted that assessment against the defendant of the *costs of the hearing which resulted in the vindication* would be contrary to the usual course of judicial administration."

The impropriety of that direction appears from the "Civil Rules" which the District Court made effective

Portion of Petitioner's Brief (in Chief) to Court of Appeals.

July 1, 1962, a little over two months after the date of Judge Bonsal's memorandum, of April 23rd and order of April 30th, 1962. Rules 6(d) and 14 make it fairly clear the costs of a hearing before a Special Master may be chargeable to a defending or opposing party, without his consent, only when he is "the unsuccessful party". Rule 14(b) provides that an "alleged contemnor" who "puts in issue his alleged misconduct or the damages thereby occasioned" is "entitled to have oral evidence taken thereon, either before the court or before a master appointed by the court". One can hardly be said to be "entitled" to a hearing if he can get it only by agreeing to pay the Special Master's fees and the other costs of the hearing.